

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division**

MICHAEL STAR, #339637,

Petitioner,

v.

ACTION NO. 2:06CV107

**GENE M. JOHNSON, Director of the
Virginia Department of Corrections,**

Respondent.

FINAL ORDER

This matter was initiated by petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition alleges violation of federal rights pertaining to petitioner's convictions on October 15, 2004, in the Circuit Court of Fairfax County, Virginia, for petit larceny (felony), third or subsequent offense, and petit larceny (misdemeanor). As a result, petitioner was sentenced to five years imprisonment, with three years and seven months suspended, on the felony charge, and twelve months imprisonment on the misdemeanor charge.

The matter was referred to a United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Civil Rule 72 of the Local Rules for the United States District Court for the Eastern District of Virginia for report and recommendation. The Magistrate Judge filed his report recommending dismissal of the petition on July 11, 2006. By copy of the report, each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. The Court received from petitioner on August 1, 2006, objections to the report.

The Court, having reviewed the record and examined the objections filed by the petitioner and having made de novo findings with respect to the portions objected to, does hereby adopt and approve the findings and recommendations set forth in the Report of the United States Magistrate Judge filed July 11, 2006. It is, therefore, ORDERED that the petition be DENIED and DISMISSED on the basis of petitioner's procedural default in the state system and that judgment be entered in respondent's favor.

To the extent that petitioner objects to the Magistrate Judge's conclusions, the objections are without merit. Petitioner raises the constitutionality of section 18.2-104 of the Virginia Code, arguing that because the statute addresses the issue of both misdemeanors and felonies, it is inconsistent. What petitioner fails to realize is that there is no constitutional issue involved when a state determines that it will punish repeat misdemeanor offenses as felonious acts, after a perpetrator commits a certain number of crimes. The statute gives clear notice of the intent in punishing a third or subsequent offense as a felony, and the perpetrator may avoid the consequences by not engaging in the conduct.

This issue was never raised by petitioner in the trial court and was only addressed in a subsequent motion, which was viewed by the trial court as a request for reconsideration of sentence. The time for an appeal was barred, and petitioner clearly defaulted. The record reveals that petitioner voluntarily entered a guilty plea and that he clearly understood that by pleading guilty, he gave up his right to appeal if he was "not satisfied with the sentence or any other aspect of

the case.” (Tr. at 16.) The Magistrate Judge’s conclusion is accurate and responsive to the circumstances presented in this petition.

Petitioner may appeal from the judgment entered pursuant to this Final Order by filing a written notice of appeal with the Clerk of this Court, United States Courthouse, 600 Granby Street, Norfolk, Virginia 23510, within thirty days from the date of entry of such judgment. Petitioner has failed to demonstrate “a substantial showing of the denial of a constitutional right.” Therefore, the Court, pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, declines to issue a certificate of appealability. See Miller-El v. Cockrell, 123 S.Ct. 1029, 1039 (2003).

The Clerk shall mail a copy of this Final Order to petitioner and to counsel of record for the respondent.

Norfolk, Virginia

August 25, 2006

/s/
Rebecca Beach Smith